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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/585,120	05/29/2007	Lars Bo Poulsen	P71352US0	9910
69289 7590 07/27/2009 COLOPLAST A/S Attention: Corporate Patents Holtedam 1 DK-3050 Humleback, DENMARK				
EXAMINER CHAPMAN, GINGER T				
ART UNIT		PAPER NUMBER		
3761				
NOTIFICATION DATE		DELIVERY MODE		
07/27/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patent@coloplast.com  
dkbvd@coloplast.com

**Advisory Action**  
**Before the Filing of an Appeal Brief**

**Application No.**

10/585,120

**Applicant(s)**

POULSEN ET AL.

**Examiner**

Ginger T. Chapman

**Art Unit**

3761

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 29 June 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 1-12, 19 and 20.  
Claim(s) withdrawn from consideration: 13-18.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/Tatyana Zalukaeva/  
Supervisory Patent Examiner, Art Unit 3761

/Ginger T Chapman/  
Examiner, Art Unit 3761

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant submits that claim 1 requires a pre-filter defining a gap between two opposed surfaces, at the constrictions, that is significantly smaller than the largest width of the constriction while Jensen teaches the gap be of such a depth to define the recess for receiving the filter, and the gap of Jensen will be larger than the largest width of the constrictions /ribs of Jensen, and since the gap of Jensen would not be smaller than the largest width of Jensen's constrictions, and therefore does not teach that claim limitation and therefore does not establish a prima facie case of obviousness.

This argument is not persuasive because: (I) the phrase "significantly smaller" does not clearly set forth the metes and bounds of how much smaller the gap is required to be; Applicant provides no criticality for the specific size gap. The specification contains no disclosure of either the critical nature of the claim limitations nor any unexpected results arising therefrom, and that as such the limitations were arbitrary and therefore obvious. Such unsupported limitations cannot be the basis for patentability, since where patentability is said to be based upon particular dimensions or another variable in the claim, the applicant must show that the chosen variables are critical. In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ 2d 1934 (Fed. Cir. 1990).

(I) claim 1 was rejected under 35 USC 103(a), and as detailed in the previous Office action, both the instant and the prior art gaps perform the substantially identical function of providing a gas flow-path with constrictions preventing obstruction of the gas pathway and filter by trapping solid and liquid body wastes in the spaces between the constrictions before the wastes /effluent clogs the filter so body wastes are directed downward into the ostomy bag, thereby allowing gas to pass easily through an unclogged filter, therefore Jensen discloses the same elements performing the same functions wherein the only difference is the relative sizes of the components and it has been held that where the only difference between the claimed device and a prior art device having claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device, Gardner v. TEC Systems, Inc., 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984). Therefore, absent evidence to the contrary, it appears that the claimed invention simply rearranges a combination of familiar elements, with each performing the same function as it had been known to perform, and yielding predictable results, absent persuasive evidence that the modifications necessary to effect the combination of elements is uniquely challenging or difficult for one of ordinary skill in the art, Ex Parte Smith, 83 USPQ 2d at 1518-9 (BPAI, 2007, citing KSR, 127 S.Ct at 1740, 83 USPQ 2d at 1396).

Accordingly, the examiner respectfully traverses Applicants arguments and maintains the art rejections of the rejected claims.